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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. RONALD PAUL ROWELL, Defendant and Appellant.	C045794 (Super. Ct. No. 102242)

APPEAL from a judgment of the Superior Court of Butte County, Thomas W. Kelly, Judge. Affirmed.

Laura Schaefer, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Senior Assistant Attorney General, Stan Cross and Julie A. Hokans, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of the Facts and Part II.

Defendant Ronald Rowell appeals from the trial court's order recommitting him as a sexually violent predator (an SVP). (Welf. & Inst. Code, § 6600 et seq., further section references are to this code unless otherwise specified.) We shall affirm the order.

In the published portion of this opinion, we reject defendant's contention that the trial court erred in accepting defense counsel's representation that defendant wanted a court trial, not a jury trial. As we shall explain, the court was not required, as defendant claims, to confirm defense counsel's representation by obtaining a personal waiver from defendant. A proceeding to commit an SVP to the Department of Mental Health for confinement is a civil proceeding with a statutory right, not constitutional right, to jury trial. Under the statutory scheme, a jury trial is waived by the failure to request one. If the accused asks for a jury trial, the request can be withdrawn by defense counsel's representation to the court that the accused has decided to proceed instead by court trial.

In an unpublished part of this opinion, we reject defendant's other claim of error.

FACTS*

In 1989, defendant was sentenced to 20 years in state prison following his no contest plea to two counts of child molestation (Pen. Code, § 288, subd. (a)), which he committed while having a position of special trust with the victim (Pen. Code, § 1203.066, former subd. (a)(9)) and after having been convicted of prior sex crimes (Pen. Code, §§ 667, subd. (a), 667.51, subd. (a)). Before the scheduled release date, the trial court found that defendant

was an SVP and ordered him committed for a period of two years pursuant to section 6604.

On August 1, 2002, the Butte County District Attorney filed a petition to extend defendant's commitment as an SVP for two more years, based on the evaluations of Dr. Douglas Korpi and Dr. Jesus Padilla.

On November 20, 2002, the trial court found probable cause to sustain the petition.

Defendant moved for a new probable cause hearing based on *Cooley v. Superior Court* (2002) 29 Cal.4th 228 (hereafter *Cooley*), decided after the doctors submitted their reports. *Cooley* identified specific findings that must be made at a probable cause hearing in order to proceed on an SVP petition. (*Id*. at p. 236.) According to defendant, the doctors' reports and the trial court's findings following the probable cause hearing neglected to address whether defendant posed a serious and well-founded risk of committing sexually violent criminal acts of a predatory nature, and whether he was amenable to voluntary treatment in a noncustodial setting. The court granted the motion for a new probable cause hearing.

The prosecutor then submitted two supplemental reports from Drs. Padilla and Korpi, addressing the issues omitted from their first evaluations. Over defendant's objections to the admission of the supplemental reports, the trial court again found probable cause to sustain the petition.

The matter was tried before the court based solely on the petition for recommitment and the doctors' original evaluations

and supplemental reports, to which defendant continued to object. The information admitted at trial disclosed the following:

Defendant refused the request of both Dr. Korpi and Dr. Padilla to interview him. Consequently, the doctors based their evaluations on a review of defendant's Department of Corrections central and medical files, and his Atascadero State Hospital (ASH) records.

In 1970, defendant pled guilty to lewd and lascivious conduct with a child under the age of 14 (Pen. Code, § 288) and was found to be a mentally disordered sex offender (MDSO). He spent two and one-half months in ASH and was placed on probation for three years, with a suspended one-year jail sentence. The information available to Dr. Korpi concerning the offense indicates that defendant molested five girls, but the records do not clarify which victim defendant admitted molesting as the basis for his plea. The records reveal that defendant had a 10-year-old girl orally copulate him; fondled his niece and attempted to have intercourse with her; rubbed the genitals of two other girls; and attempted to rub the genitals of another girl.

Defendant's next offense occurred in 1982. He molested his developmentally disabled stepdaughter, when she was between the ages of 10 and 12 years old. At first, defendant fondled her breasts and vagina and had her "hold and lick his penis." Eventually, defendant forced her to have intercourse with him. The molestations continued two to four times a week for two years, until his stepdaughter became pregnant and defendant's misconduct was discovered. He was convicted of lewd and lascivious conduct with a child under the age of 14 (Pen. Code, § 288, subd. (a)),

was sentenced to eight years in state prison, and was paroled on August 8, 1986.

In May 1987, defendant began living with, and then married, a woman with two young daughters who were approximately two and three years old. He masturbated in one girl's presence, forced her to masturbate and orally copulate him, and sodomized her. He also orally copulated and sodomized the other girl. Defendant pled no contest to molesting the girls and received a 20-year prison sentence.

Dr. Korpi reviewed defendant's psychiatric, substance abuse, developmental and sexual histories, as well as his history of criminal and sexual misconduct.[1] Dr. Korpi also reviewed defendant's treatment progress during his first SVP commitment at ASH, noting that defendant refused sex specific treatment and refused to recognize that he is at risk for sexual reoffense. Dr. Korpi diagnosed him as being alcohol dependent and suffering from "Pedophilia, Sexually Attracted to Females, Non-exclusive Type," and "Personality Disorder Not Otherwise Specified, with Antisocial Personality Traits."

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[1] Defendant had trouble controlling his anger, utilized prostitutes on a very regular basis as a young man, considered being a pimp, and had oral sex with inmates while in prison. Regarding his earliest child molestation offense, he believed some of the children solicited him and commented that one of them did a particularly good job of orally copulating him. He preferred sex with his stepdaughter over his wife because the young girl "was tighter." He blamed his next wife for his molestation of her daughters, claiming she put the girls in the shower with him, they touched him, and this led him to "start[] messing with them."

Dr. Korpi used two tests that incorporate static risk factors for assessing an individual's risk of reoffending. One test indicated defendant was 37 percent likely to commit a new offense within 10 years of release from custody. Another test, the STATIC 99, indicated he was 19 percent likely to be convicted of a new sexual crime within 15 years of his release from custody. Although this only demonstrated a "medium to medium high likelihood" of defendant reoffending during his lifetime, Dr. Korpi noted that defendant "suffers traits related to almost every single static risk factor." Dr. Korpi also considered other dynamic factors not accounted for in the aforementioned tests, such as defendant's lack of social and appropriate intimate contacts, his "sense that he has no disorder requiring treatment," his sexual fantasizing about children as recently as 1999, and his inability to control his anger and cooperate with the hospital staff. Dr. Korpi opined defendant's mental disorders predisposed him to commit sexually criminal acts and that he was likely to reoffend in a sexually violent and criminal manner if he were released into the community.

Like Dr. Korpi, Dr. Padilla diagnosed defendant as suffering from "Pedophilia, sexually attracted to females, non-exclusive type," and alcohol dependency. He administered the STATIC 99 test and determined that defendant had a 12 to 26 percent chance of reoffending within 5 years and a 19 to 36 percent chance of doing so within 15 years. Based on the results of this test, as well as certain dynamic factors not accounted for on the STATIC 99, Dr. Padilla opined that defendant met the criteria for commitment under the SVP Act. Dr. Padilla noted defendant is a remorseless,

impulsive, hostile individual with a sense of sexual entitlement. Defendant failed to recognize the effect his behavior had on his victims and blamed others for his behavior, which increased his potential for recidivism.

Both doctors prepared supplemental reports in March 2003, addressing whether defendant is likely to commit a sexually violent offense of a predatory nature in the future, and whether defendant is amenable to voluntary treatment outside of a custodial setting. In answering these questions, they did not conduct new evaluations; rather, they relied on their prior evaluations and their review of defendant's records. The doctors concluded defendant was likely to commit a sexual offense of a predatory nature in the future, based upon the fact that his past relationships with victims had been established or promoted primarily for the purpose of sexual victimization, or his victims had been casual acquaintances. They further opined he was not amenable to voluntary treatment outside of a custodial setting, observing that defendant had not been compliant with treatment in custody and was unlikely to seek treatment if released.

The trial court found beyond a reasonable doubt that defendant had been convicted of qualifying sexually violent offenses against at least two victims, that he suffered from a mental disorder which made it likely that defendant would engage in sexually violent and predatory criminal conduct in the future, and that he was "immune" to treatment. Hence, the court extended defendant's commitment as an SVP for another two years.

DISCUSSION

I

The Sixth Amendment of the United States Constitution states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." By its express terms, the right to a jury trial extends only to criminal prosecutions.

Article I, section 16 of the California Constitution states: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict. A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel. In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute."

Thus, the right to a jury trial is afforded to both criminal and civil litigants under the California Constitution. However, a criminal defendant's right to a jury trial may be waived only by his or her express consent in open court, whereas a civil litigant's right may be waived in the manner prescribed by statute.

An SVP commitment proceeding is not a criminal cause; it is civil in nature. (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1171-1172.) Thus, the state and federal constitutional protection of the right to a jury trial afforded to criminal defendants is inapplicable. Furthermore, an SVP proceeding, like other civil commitment proceedings, is a special proceeding, not a civil action (*People v. Superior Court (Cheek)* (2001) 94 Cal.App.4th 980, 988 (hereafter *Cheek*); *Leake v. Superior Court* (2001) 87 Cal.App.4th

675, 679-680), which means there is no *constitutional* right to a jury trial. (*People v. Fuller* (1964) 226 Cal.App.2d 331, 335.)

"[A]n SVPA commitment proceeding is a special proceeding of a civil nature, because it is neither an action at law nor a suit in equity, but instead is a civil commitment proceeding commenced by petition independently of a pending action." (*Cheek, supra,* 94 Cal.App.4th at p. 988.) Civil commitment proceedings "are civil in nature and of a character unknown at common law. [Citation.]" (*People v. Fuller, supra,* 226 Cal.App.2d at p. 335.) "And, in such civil proceedings, unknown to the common law (as distinguished from ordinary civil and criminal cases), the use of a jury is a matter of legislative grant and not of constitutional right. [Citation.]" (*Ibid.*; see also *In re De La O* (1963) 59 Cal.2d 128, 150 [narcotics addict commitment proceedings "are in the nature of special civil proceedings unknown to the common law, and hence there is no right to jury trial unless it is given by the statute"]; *People v. Berry* (1968) 257 Cal.App.2d 731, 736 [proceedings under MDSO statute]; *Smith v. Superior Court* (1965) 234 Cal.App.2d 1, 5-6 [proceedings to determine restoration to sanity].)

In other words, contrary to defendant's claims, the right to a jury in SVPA proceedings is of statutory origin and character, rather than constitutional.

The statute governing the right to a jury trial in SVP cases is section 6603, which states in pertinent part: "(a) A person subject to this article shall be entitled to a trial by jury . . . . [¶] (b) The attorney petitioning for commitment under this article shall have the right to demand that the trial be before a jury. [¶] . . .

[¶] (e) If the person subject to this article or the petitioning attorney does not demand a jury trial, the trial shall be before the court without a jury."

Under section 6603, a defendant's right to a jury trial in an SVP proceeding is waived by the simple failure to demand one. There is no requirement that the statutory right to a jury trial be personally waived.

In this case, defendant initially demanded a jury trial through his attorney, but thereafter defense counsel filed a written declaration under penalty of perjury stating he had spoken with defendant and defendant no longer wanted a jury trial. In civil proceedings, a jury may be waived "[b]y written consent filed with the clerk or judge" (Code Civ. Proc., § 631, subd. (d)(2)), and "where a jury trial right is merely statutory . . . the right may be waived by counsel." (*People v. Montoya* (2001) 86 Cal.App.4th 825, 829 [counsel may waive the defendant's statutory right to a jury trial in a mentally disordered offender proceeding]; see also, *People v. Vera* (1997) 15 Cal.4th 269, 273, 279 [statutory jury trial right regarding truth of prior alleged convictions may be waived by counsel]; *People v. Masterson* (1994) 8 Cal.4th 965, 972 [counsel may waive a client's statutory right to a jury trial in a competency proceeding even over the client's objection]; *Conservatorship of Mary K*. (1991) 234 Cal.App.3d 265, 271 [counsel may waive a client's statutory jury right in a conservatorship proceeding].)

Defendant does not contend that defense counsel's declaration that defendant wished to waive a jury trial was false, or that

counsel was without actual authority to waive a jury. Thus, the record supports the conclusion that the right to a jury trial on the SVP petition was validly waived. (*Conservatorship of Mary K.*, *supra*, 234 Cal.App.3d at p. 271.)

Defendant disagrees, relying on a number of older cases concerning the rights afforded to defendants in civil commitment proceedings. (See, e.g., *People v. Feagley* (1975) 14 Cal.3d 338, 356-358 [defendant in MDSO proceeding has right to a unanimous jury verdict]; *People v. Burnick* (1975) 14 Cal.3d 306, 310 [reasonable doubt standard of proof applies in MDSO proceedings]; *In re Gary W.* (1971) 5 Cal.3d 296, 306-308 [ward has the right to a jury trial in a proceeding to extend Youth Authority commitment]; *People v. Alvas* (1990) 221 Cal.App.3d 1459, 1463-1464 [defendant must be advised of fundamental right to a jury trial in commitments under the Mentally Retarded Persons Law]; *People v. Colvin* (1981) 114 Cal.App.3d 614, 623-624 [defendant must be advised of right to jury trial in MDSO proceedings]; *People v. Malins* (1972) 24 Cal.App.3d 812, 818-820 [where jury trial has been demanded in proceedings to commit defendant as a narcotics addict, right is not waived by failure to appear].)

He contends these cases hold that the interests involved in civil commitment proceedings are no less fundamental than those in criminal proceedings, and that the defendant in a commitment proceeding "'is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings.'" (*People v. Burnick, supra*, 14 Cal.3d at pp. 317-

318, italics omitted.) Thus, according to defendant, a personal waiver of his right to a jury trial was required. We disagree.

"[I]n recent years, courts have reevaluated the nature of civil commitment proceedings and the application of criminal procedural safeguards in those proceedings. This reevaluation has led to the conclusion that defendants in civil commitment proceedings, generally, are not constitutionally entitled to the procedural safeguards afforded to defendants in criminal trials." (*People v. Beeson* (2002) 99 Cal.App.4th 1393, 1405; see, e.g., *Hubbart v. Superior Court, supra*, 19 Cal.4th 1138; *Kansas v. Hendricks* (1997) 521 U.S. 346 [138 L.Ed.2d 501]; *Allen v. Illinois* (1986) 478 U.S. 364, 372 [92 L.Ed.2d 296, 306].)

In *Allen v. Illinois, supra,* 478 U.S. 364 [92 L.Ed.2d 296], the United States Supreme Court expressly rejected the notion that civil commitment proceedings "requir[e] the full panoply of rights applicable" in criminal cases. (*Id.* at p. 372 [92 L.Ed.2d at p. 306].) And both the United States and California Supreme Courts have made clear that all of the protections of a criminal case do not apply to civil commitment proceedings for sexual offenders as long as the purpose and effect of the proceeding is not punitive. (*Hubbart v. Superior Court, supra*, 19 Cal.4th at pp. 1170-1179; *Kansas v. Hendricks, supra,* 521 U.S. at pp. 368-371 [138 L.Ed.2d at pp. 519-521].)

Hence, the fact that the interests involved in involuntary commitment proceedings are fundamental enough to require a jury trial does not lead ineluctably to the conclusion that the waiver of a jury trial in such proceedings must be personal as in criminal

prosecutions. The fundamental right to a jury has been protected by section 6603, which grants the defendant the right to a jury trial upon demand. But the SVP commitment proceeding is a civil proceeding, not a criminal one, and the full panoply of rights applicable in criminal cases do not apply. (*Allen v. Illinois, supra,* 478 U.S. at p. 372 [92 L.Ed.2d at p. 306] [state's "decision . . . to provide some of the safeguards applicable in criminal trials cannot itself turn these proceedings into criminal prosecutions requiring the full panoply of rights applicable there"].)

Accordingly, a defendant's personal waiver of a jury trial in an SVP proceeding is not required, and the trial court properly accepted defense counsel's declaration that defendant wanted a court trial.

In any event, it is not reasonably probable that a different result would have occurred if the trial court had asked defendant whether he was, in fact, waiving the right to a jury trial. (See *People v. Epps* (2001) 25 Cal.4th 19, 29.) Defense counsel declared under oath that defendant waived his right to a jury trial; defendant did not challenge his counsel's declaration; and the People presented overwhelming evidence that defendant was an SVP.

II*

Defendant contends the trial court erred in recommitting him based on psychological evaluations that, in his view, do not conform to the requirements of the SVP Act.

The two doctors' original evaluations did not address whether defendant presented a serious and well-founded risk of committing

sexually violent criminal acts of a predatory nature, and did not consider whether he was amenable to voluntary treatment on release. (*Cooley, supra*, 29 Cal.4th at p. 256.) The People sought to cure these deficiencies by submitting supplemental reports from the doctors addressing these issues.

Defendant acknowledges that the filing of updated evaluations is permitted under section 6603, subdivision (c), but as he did in the trial court, he posits that the supplemental reports do not conform to statutory requirements since they do not specifically "include review of available medical and psychological records, including treatment records, consultation with current treating clinicians, and interviews of the person being evaluated, either voluntarily or by court order." (§ 6603, subd. (c).)[2] Relying

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[2] Section 6603, subdivision (c)(1) states in pertinent part: "If the attorney petitioning for commitment under this article determines that updated evaluations are necessary in order to properly present the case for commitment, the attorney may request the State Department of Mental Health to perform updated evaluations. If one or more of the original evaluators is no longer available to testify for the petitioner in court proceedings, the attorney petitioning for commitment under this article may request the State Department of Mental Health to perform replacement evaluations. When a request is made for updated or replacement evaluations, the State Department of Mental Health shall perform the requested evaluations and forward them to the petitioning attorney and to the counsel for the person subject to this article. However, updated or replacement evaluations shall not be performed except as necessary to update one or more of the original evaluations or to replace the evaluation of an evaluator who is no longer available to testify for the petitioner in court proceedings. These updated or replacement evaluations shall include review of available medical and psychological records, including treatment records, consultation with current treating clinicians, and

on *Sporich v. Superior Court* (2000) 77 Cal.App.4th 422 (hereafter *Sporich*), he contends the SVP Act does not otherwise allow the filing of supplemental evaluations. According to defendant, the supplemental evaluations are supposed to replace the original evaluations, and must cover all the topics required by section 6601, which the doctors' supplemental evaluations do not do. Therefore, defendant claims, the court erred in considering the supplemental evaluations, and the error was prejudicial because there is insufficient evidence in the original evaluations to support his recommitment. We disagree.

When defendant objected to the supplemental reports in the trial court, the prosecutor responded that the reports were not updated evaluations within the meaning of section 6603. They were simply addenda intended to address omitted issues made relevant by *Cooley*, decided after the initial reports were prepared. Under such circumstances, the prosecutor argued, it was unnecessary for the doctors to conduct entirely new evaluations, rather than merely supplement their prior reports with the information required by *Cooley* based on their initial evaluation of defendant and his records.

The trial court overruled defendant's objections, finding that the criteria mandated by *Cooley* were not required when the doctors

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interviews of the person being evaluated, either voluntarily or by court order. If an updated or replacement evaluation results in a split opinion as to whether the person subject to this article meets the criteria for commitment, the State Department of Mental Health shall conduct two additional evaluations in accordance with subdivision (f) of Section 6601."

originally submitted their written evaluations. Therefore, it was appropriate for the doctors to proffer supplemental opinions to cure these deficiencies, and because these opinions were based on their initial evaluations of defendant, the supplemental reports were not updated evaluations within the meaning of section 6603 and did not have to comply with the statute. The court was correct.

Sporich, supra, 77 Cal.App.4th 422, upon which defendant relies, held that the version of the SVP Act then in effect did not permit the county to compel a defendant to submit to additional interviews designed to establish that despite a significant lapse of time since the initial evaluations, the defendant still suffered from a currently diagnosed medical disorder. (*Id*. at pp. 424-427.) *Sporich* stated: "An order for additional precommitment mental examinations to establish currency is simply not authorized by the SVP Act," which "allows the state to conduct two precommitment mental examinations–-no more, and no less." (*Id*. at p. 427.) Thus, *Sporich* held, permitting additional medical examinations without express statutory authorization would violate the defendant's privacy interests. (*Id*. at pp. 426-427.)

Thereafter, the Legislature amended section 6603, by adding subdivision (c) to address the holding in *Sporich,* and "clarif[y] the trial court's authority to order updated mental interviews and evaluations, as well as the district attorney's right of access to treatment information." (*Albertson v. Superior Court* (2001) 25 Cal.4th 796, 804, 805-806.) The amended statute permits the district attorney to obtain a new evaluation of the defendant

and to obtain access to the defendant's treatment records under specified circumstances. (§ 6603, subd. (c); *Albertson v. Superior Court, supra,* 25 Cal.4th at p. 803.)

Here, the prosecutor was not attempting to have the doctors interview defendant and access his medical records again, which would invoke the privacy concerns noted by *Sporich* and trigger the requirements of section 6603, subdivision (c). Rather, in response to *Cooley,* the prosecutor simply asked the doctors to proffer an additional opinion, based on their existing evaluations and review of defendant's treatment records, regarding whether defendant was predatory and not amenable to voluntary treatment outside of a custodial setting.

Defendant points to nothing in the SVP Act or *Sporich* that precludes the doctors from offering a further opinion on additional issues under the circumstances of the present case. And he does not contend that, when viewed in conjunction, the doctors' reports do not support the trial court's determination that he is an SVP. Accordingly, his claim of error is unavailing.

DISPOSITION

The judgment is affirmed.

SCOTLAND, P.J.

We concur:

DAVIS, J.

MORRISON, J.